

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**  
**Washington D.C. 20554**

In the Matter of Qwest Communications International  
Inc. and CenturyTel, Inc. d/b/a Century Link  
Application for Transfer of Control Under Section 214  
of the Communications Act, As Amended

WC Docket No. 10-110

**OPENING COMMENTS OF INFOTELECOM, LLC**  
**ON APPLICATIONS FILED BY QWEST COMMUNICATIONS INTERNATIONAL**  
**INC. AND CENTURYTEL, INC., D/B/A/ CENTURYLINK FOR CONSENT**  
**TO TRANSFER OF CONTROL**

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Infotelecom, LLC (“Infotelecom”) submits these Opening Comments in response to the Federal Communications Commission’s (FCC) Public Notice released May 28, 2010 soliciting comments on the proposed merger between Qwest Communications International Inc. (“Qwest”) and CenturyTel, Inc. d/b/a CenturyLink (“CenturyLink”). Infotelecom submits that the proposed merger is not in the public interest because it will further concentrate the market power of the two utilities, thereby giving the merged entity greater opportunity to impede competition in the wholesale market. Such harms, however, may be mitigated if the FCC requires Qwest and CenturyLink to commit to certain safeguards that ensure that the merged entities will deal with competitive local exchange carriers (“CLECs”) such as Infotelecom in a good faith and non-discriminatory manner. Absent such safeguards, the proposed merger would not be in the public interest, and therefore should not be approved.

## **I. Legal Standard for Merger Review**

Pursuant to 47 U.S.C. § 214(a), when reviewing a merger application of a utility, the Commission must undertake a multi-part review. The Commission must first determine whether the proposed merger complies with the specific provisions of the Telecommunications Act, other applicable statutes, and the Commission's rules.<sup>1</sup> Even if the proposed transaction would not violate a statute or rule, the Commission must consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.<sup>2</sup> Finally, the Commission must employ a balancing test weighing any potential public interest benefits of the merger against all potential public interest harms.<sup>3</sup> The applicants must demonstrate through a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.

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<sup>1</sup> See e.g., *Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46 (2009) (“*CenturyTel/Embarq Merger Order*”); *AT&T, Inc. and Bell/South Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5663 (2007) (“*AT&T/BellSouth Merger Order*”).

<sup>2</sup> *CenturyTel/Embarq Merger Order*, at 8745-46.

<sup>3</sup> *CenturyTel/Embarq Merger Order*, at 8746; *AT&T/BellSouth Merger Order*, at 5663.

The FCC has noted in prior merger reviews that the public interest evaluation “necessarily encompasses” the broad aims of the Communications Act, which include, among other things, “a deeply rooted preference” for competition, whether the merger will affect the quality of communications services and will result in the provision of new or additional services to consumers.”<sup>4</sup> The FCC’s analysis must take a broad view of competition, and determine “whether a transaction will enhance, rather than merely preserve, existing competition. . . .”<sup>5</sup> If the FCC determines that a proposed merger could harm the public interest (for example by impeding competition), it has authority to impose and enforce conditions that ensure that the public interest is served by the transaction.<sup>6</sup>

When it reviewed the CenturyLink/Embarq merger, the FCC determined that the transaction might increase those entities’ incentive and opportunity to engage in anticompetitive activity. For example, the FCC noted that the merged entity could export practices that impede competition from one service area to the other.<sup>7</sup> To address these anticompetitive effects of the merger, the FCC required CenturyLink and Embarq to submit and follow a set of commitments to prevent anticompetitive conduct, particularly against wholesale customers. The strikingly similar CenturyLink/Embarq merger, which was finalized just over a year ago, provides a compelling roadmap for the evaluation of the instant merger.

## **II. Embarq Refuses To Negotiate ICAs in Good Faith or to Allow CLECs to Adopt Existing ICAs As Required Under the Telecommunications Act**

When Congress passed the Act it created a new telecommunications regime expressly intended to encourage competition in the local telecommunications marketplace. Section 257 of the Act expressly requires the removal of barriers to entry for entrepreneurs providing telecommunications and information services, and encourages “vigorous economic competition” and “technological advancement.” To further local competition, Sections 251 and 252 of the

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<sup>4</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>5</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>6</sup> *CenturyTel/Embarq Merger Order*, at 8747.

<sup>7</sup> *CenturyTel/Embarq Merger Order*, at 8755.

1996 Act impose specific duties on ILECs and establish a mechanism for implementing them. Section 251(c)(1)<sup>8</sup> of the Act requires ILECs to negotiate ICAs with CLECs in good faith, and Section 252(i)<sup>9</sup> allows CLECs to opt in to an ICA previously negotiated between the ILEC and another CLEC. As explained below, Embarq has failed to comply with either requirement with respect to negotiating an ICA with Infotelecom. If CenturyLink/Embarq is allowed to purchase Qwest, as proposed, without safeguards, the merged entity may perpetuate and export Embarq's anticompetitive conduct to Qwest's service areas.

Infotelecom is certified to provide competitive local exchange services, in particular, Infotelecom carries traffic from voice over Internet Protocol (VoIP) providers. Use of IP technology to carry voice and thereby offering greater efficiency and features is precisely the type of innovation the Telecommunications Act intended to encourage. Infotelecom, however, has been unable attempting to obtain a suitable ICA with CenturyLink/Embarq for more than six months without success.<sup>10</sup> The failure to obtain an ICA stems primarily from two problems. First, Embarq has been extremely unresponsive to Infotelecom's request for an ICA pursuant to Sections 251 and 252 of the Telecommunications Act. Infotelecom first contacted Embarq requesting an ICA on January 26, 2010, and since that time, Embarq has responded on only two occasions, and has failed to provide any ICA that meets Infotelecom's needs.<sup>11</sup> Second, what little communication Embarq has had with Infotelecom has consisted almost exclusively of Embarq's denial of Infotelecom's request to adopt the same ICA provision for the termination of VoIP traffic that Embarq offers to another CLEC, Level 3.<sup>12</sup>

Infotelecom notes that other ILECs, such as Qwest, offer ICAs with almost identical terms to those sought by Infotelecom for the termination of VoIP traffic.<sup>13</sup> Embarq's refusal to

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<sup>8</sup> 47 U.S.C. § 251(c)(1).

<sup>9</sup> 47 U.S.C. § 252(i).

<sup>10</sup> Declaration of Jeff Slater in Support of Infotelecom, LLC's Comments Opposing Merger of CenturyLink/Embarq with Qwest ("Slater Decl.").

<sup>11</sup> Slater Decl., at ¶4.

<sup>12</sup> Slater Decl., at ¶5-8.

<sup>13</sup> Slater Decl., at ¶10.

negotiate in good faith is an impediment to Infotelecom's market entry in Florida, Texas and Nevada.<sup>14</sup> By withholding an ICA with similar terms and conditions to the Level 3 ICA, Embarq is acting in an anti-competitive manner, and Infotelecom has legitimate concerns that Embarq will impose its same anti-competitive conduct on CLECs in service areas currently served by an independent Qwest.

CenturyLink/Embarq's unresponsiveness and unwillingness to provide a suitable ICA to Infotelecom violates Sections 251(c) and 252(i) of the Act. Infotelecom believes that such blatant anticompetitive conduct could be perpetuated in an even greater service area if CenturyLink is allowed to merge with Qwest. If that were to occur, it would substantially worsen CLEC's ability to compete in the Qwest service territory because Qwest has addressed the termination of VoIP in its ICA offerings with other CLECs.

If Qwest were to adopt (voluntarily or not) CenturyLink's anticompetitive behavior regarding ICA negotiations, competition will be harmed and the public interest will not be served. Therefore, Infotelecom believes that the FCC must adopt a set of safeguards, as it has in the recent CenturyLink/Embarq merger as well as other utility mergers, in order to protect the public interest.

### **III. The FCC Required Safeguards in CenturyLink/Embarq Merger To Protect CLECs From Anticompetitive Conduct And Should Do The Same Here**

While CenturyLink/Embarq and Qwest make a blanket statement that their merger would not harm wholesale customers, their Application includes only one specific assurance – “existing wholesale arrangements will remain intact, with the surviving company honoring the terms of existing arrangements.”<sup>15</sup> Merely stating that it does not intend to repudiate existing contracts, however, is a feeble offer. At the same time that it has failed to provide meaningful assurance that it will comply with its obligation of fair dealing with CLECs, the Applicant companies have made statements elsewhere that call into question the intentions of the new entity.

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<sup>14</sup> Slater Decl., at ¶11.

<sup>15</sup> Application for Consent to Transfer Control, May 10, 2010, at p.37.

CenturyLink/Embarq/Qwest have filed an application seeking local approval for the merger in Washington state. In that application, the companies state that one of the “key” benefits of the merger would be to create a financially stronger company that can “compete against cable telephony providers, wireless carriers, VoIP offerings, and CLECs . . . .”<sup>16</sup> Given this statement, it is questionable whether a merged CenturyLink/Embarq and Qwest will use its increased strength to facilitate the operations of the CLECs against whom they directly compete.

If the merger goes forward, CenturyLink/Embarq will gain local exchange networks in four additional states -- Arizona, Utah, North Dakota, and South Dakota -- thereby increasing its operations to a total of 37 states.<sup>17</sup> Thus, simply on a geographic basis, the merged entity will have an increased incentive and ability to discriminate against its wholesale customers by leveraging its increased footprint and adopting the worst practices of CenturyTel in the Embarq service area.

The FCC expressed these exact concerns when it reviewed the strikingly similar proposed merger of CenturyLink and Embarq just over a year ago. The FCC stated:

Consistent with the “Big Footprint” theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of CenturyTel's study area resulting from the merger may increase its incentive to engage in anticompetitive activity . . . . Additionally, to the extent that CenturyTel has been less willing to cooperate with competitors than Embarq -- as numerous commenters allege -- following the merger, CenturyTel may extend this behavior to the Embarq territories. In order to address these potential harms, the Applicants have proposed a series of voluntary commitments, summarized above and included in Appendix C.<sup>18</sup>

The further merger of CenturyLink/Embarq with Qwest poses exactly the same concerns regarding perpetuation and export of anticompetitive practices. Therefore, the FCC should approve the merger only with specific conditions to guard against anticompetitive conduct by the newly merged entity.

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<sup>16</sup> Joint Application for Expedited Approval of Indirect Control, Washington Public Utilities Docket No. UT-100820, May 13, 2010, at ¶30.

<sup>17</sup> Application for Consent to Transfer Control, FCC WC Docket 10-110, May 10, 2010, at p. 6.

<sup>18</sup> *CenturyTel/Embarq Merger Order*, at 8755 (internal citations omitted).

#### **IV. The FCC Required Safeguards in CenturyLink/Embarq Merger To Protect CLECs**

Infotelecom is primarily concerned with obtaining a suitable ICA in a timely manner so that it may move forward with its market entry plans. As discussed above, it has already been delayed. To prevent further delay or other anti-competitive behavior, Infotelecom respectfully submits that, at a minimum,<sup>19</sup> the FCC must include the following safeguards as a condition to approving the CenturyLink/Embarq/Qwest merger.

- The merged entity must allow CLECs to adopt an ICA that is available from any of the merged entities and use that same ICA with any of the other entities throughout the new service territory.
- The merged entity must allow CLECs to adopt an existing ICA within 30 days from request by the CLEC and must submit such adoption to the local state regulatory agency (if necessary) within seven days from the date of that adoption.
- The merged entity must allow CLECs to renew their existing ICA (whether it was in place prior to the merger or not) for at least one three-year term.
- If a CLEC does not want to renew an existing ICA in its entirety, the merged entity must agree to use the existing ICA as a starting point for negotiations if the CLEC so requests.
- The merged entity must commit to offer any waivers or amendments to existing ICAs to any other CLEC that requests it.

Without these safeguards, Infotelecom respectfully submits that the FCC cannot allow the merger to go forward because it will not serve the public interest.

#### **V. Conclusion**

For all of the foregoing reasons, Infotelecom submits that the FCC may not find that the CenturyLink/Embarq/Qwest is in the public interest unless appropriate safeguards are put in place to protect against anticompetitive behavior of the merged entity in the wholesale marketplace.

Dated: July 12, 2010

Sincerely,

/s/Anita Taff-Rice

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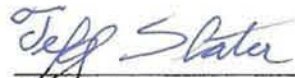
<sup>19</sup> Infotelecom reserves the right to comment in support of safeguards proposed by other parties.

**DECLARATION OF JEFF SLATER IN SUPPORT OF INFOTELECOM, LLC'S  
COMMENTS OPPOSING MERGER OF CENTURYLINK/EMBARQ WITH QWEST**

I, Jeff Slater, hereby declare as follows:

1. I am over the age of 18.
2. I have personal knowledge of the facts in this matter and if called upon to testify could and would do so.
3. I am the President of Infotelecom, LLC and have been attempting to obtain a suitable Interconnection Agreement (ICA) with Embarq in Nevada, Texas and Florida.
4. On January 26, 2010, I contacted Embarq via email requesting to enter into negotiations pursuant to Sections 251 and 252 of the Telecommunications Act for an ICA for Infotelecom.
5. On February 10, 2010, Ms. Cathy Lail with Embarq contacted me by telephone to discuss Infotelecom's request for an ICA. Infotelecom informed Ms. Lail that it was interested in adopting the Level 3 ICA which includes a provision for the termination of VoIP traffic consistent with FCC rules. Infotelecom requested a copy of the Level 3 ICA for review and possible adoption.
6. Ms. Lail responded that she did not think the Level 3 ICA would be useful for Infotelecom as it contained several provisions, such as large traffic volume requirements, that likely render the Level 3 ICA unusable for Infotelecom.
7. Infotelecom asked Ms. Lail to provide an ICA for Infotelecom to review containing language treating VoIP originated traffic similarly to the Level 3 ICA.
8. On June 17, 2010 Infotelecom again contacted Ms. Lail of Embarq as we received no response to our February 10, 2010 request for an ICA treating VoIP originated traffic consistent with the Level 3 ICA and with current FCC rules. Ms. Lail responded that Infotelecom needed to review Embarq's "standard" ICA, as Embarq apparently did not have an ICA meeting Infotelecom's needs.
9. Ms. Lail has to date not provided the "standard" ICA, or any ICA, for Infotelecom's review.
10. Infotelecom has ICAs in force with other ILECs, including Qwest, which treat VoIP traffic according to current FCC rules.
11. Embarq's refusal to negotiate in good faith is an impediment to Infotelecom's market entry in Florida, Texas and Nevada.
12. By withholding an ICA with similar terms and conditions to the Level 3 ICA, Embarq is acting in an anti-competitive manner.

I declare under penalty of perjury of the laws of the United States that these facts are true to the best of my knowledge and belief.



Jeff Slater  
President of Infotelecom, LLC